[Cite as *State v. Pollock*, 2010-Ohio-1304.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
TODD C. POLLOCK	:	Case No. CT2009-0010
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. CR2008-0278
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 25, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RON WELCH 27 North Fifth Street Zanesville, OH 43701	EMILY STRANG TARBERT 825 Adair Avenue Zanesville, OH 43701

Farmer, J.

{¶1} On October 8, 2009, the Muskingum County Grand Jury indicted appellant, Todd Pollock, on one count of receiving stolen property in violation of R.C. 2913.51(A). A jury trial commenced on December 18, 2008. The jury found appellant guilty as charged. By judgment entry filed December 19, 2008, the trial court sentenced appellant to eighteen months in prison.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "THE VERDICT IS NOT SUSTAINED BY THE SUFFICIENCY OF THE EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II

{¶4} "THE COURT ERRED IN REQUIRING MR. POLLOCK'S WIFE TO TESTIFY AGAINST HIM IN A CRIMINAL TRIAL."

III

{¶5} "DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL."

I

{¶6} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶7} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The relevant inquiry is whether, after viewing the

evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶8} Appellant was convicted of receiving stolen property in violation of R.C. 2913.51(A) which states, "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶9} In the early morning hours of October 5, 2008, Zanesville Police Patrolman Scott Comstock stopped a vehicle after he discovered the vehicle had been reported stolen. T. at 97. Appellant was a passenger in the vehicle. T. at 98. Appellant was subsequently charged with receiving stolen property. It is appellant's position there was insufficient evidence to prove he drove the vehicle and therefore was in possession of stolen property. Appellant does not contest the fact that Kristopher Pettit's vehicle was stolen between 5:00 p.m. and midnight on October 4, 2008 and that Mr. Petit did not give him permission to have the vehicle.

{¶10} Terry Waller, an acquaintance of appellant, testified on October 4, 2008 between 11:30 p.m. and midnight, appellant pulled into his driveway driving the vehicle in question. T. at 112. At that time, appellant was alone in the vehicle. T. at 113.

{¶11} We find sufficient credible evidence that appellant had sole possession of the stolen vehicle before the police stop. We find such evidence, if believed, substantiates a conviction for receiving stolen property. We find no manifest miscarriage of justice.

{¶12} Assignment of Error I is denied.

II, III

{¶13} Appellant claims the trial court erred in requiring his wife, Christy Pollock, to testify against him in a criminal trial in violation of Evid.R. 601, and his trial counsel was ineffective for failing to invoke spousal privilege under R.C. 2945.42.

{¶14} The standard for ineffective assistance of counsel is as follows:

{¶15} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶16} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State*

v. Bradley (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011.

{¶17} Because no objection was made to Mrs. Pollock's testimony, we are required to review this assignment under a plain error standard. In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

{¶18} Appellant never objected to Mrs. Pollock testifying, but now argues she purposefully attempted to invoke spousal privilege:

{¶19} "Q. And when you spoke to him [appellant] when he was in the back of a cop car, what did he want you to do?

{¶20} "THE COURT: Take your time.

{¶21} "THE WITNESS [CHRISTY POLLOCK]: Can I be excused, please?

{¶22} "THE COURT: No. You have to answer the question, Ms. Pollock." T. at 103.

{¶23} Thereafter, Mrs. Pollock testified to the following in pertinent part, regarding appellant's attempt to have Mrs. Pollack provide him an alibi for the evening in question:

{¶24} "Q. Ms. Pollock, when you spoke to your husband from the back of the cruiser, when he was in the back of the cruiser, what did he want you to do?

{¶25} "A. He wanted me to come down and talk to the officers.

{¶26} "Q. And what did he want you to tell the officers?

{¶27} "A. We had been fighting and he got out of my car.

{¶28} "Q. I'm sorry?

{¶29} "A. That we had been fighting and he got out of my car and got in a vehicle with another person.

{¶30} "Q. I'm sorry, Miss Pollock. I still couldn't understand what you said.

{¶31} "A. That he had gotten out - - we were fighting and he had got out of my car.

{¶32} "Q. And would that have been the truth?

{¶33} "A. No.

{¶34} "Q. So Mr. Pollock asked for you to lie about his whereabouts that evening?

{¶35} "***

{¶36} "Q. Would that have been a truthful statement?

{¶37} "A. No.

{¶38} "Q. And did he tell you why he wanted you to say this?

{¶39} "A. No." T. at 103-104.

{¶40} Evid.R. 601 governs the competency of a witness and states the following:

{¶41} "Every person is competent to be a witness except:

{¶42} "(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

{¶43} "(1) a crime against the testifying spouse or a child of either spouse is charged;

{¶44} "(2) the testifying spouse elects to testify."

{¶45} The focus of Evid.R. 601(B) is the competency of the testifying spouse; in contrast, R.C. 2945.42 focuses on the privileged nature of spousal communications:

{¶46} "Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness***."

{¶47} As explained by the Supreme Court of Ohio in *State v. Adamson,* 72 Ohio St.3d 431, 433-434, 1995-Ohio-199:

{¶48} "Spousal privilege and spousal competency are distinct legal concepts which interrelate and provide two different levels of protection for communications between spouses. Under R.C. 2945.42, an accused may prevent a spouse from testifying about private acts or communications. However, even when the privilege does not apply because another person witnessed the acts or communications, a spouse still is not *competent* to testify about those acts or communications unless she specifically elects to testify. While the presence of a witness strips away the protection of the privilege, the protection provided pursuant to Evid.R. 601 remains."

{¶49} The *Adamson* court at 434 further held:

{¶50} "Competency determinations are the province of the trial judge. *State v. Clark* (1994), 71 Ohio St.3d 466, 469, 644 N.E.2d 331, 334. Pursuant to Evid.R. 601(A), the trial judge must determine whether a child under ten is competent to testify by inquiring as to whether the child is capable of 'receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.' See,

also, *State v. Frazier* (1991), 61 Ohio St.3d 247, 574 N.E.2d 483. Likewise, under Evid.R. 601(B), the judge must take an active role in determining competency, and make an affirmative determination on the record that the spouse has elected to testify. Just because a spouse responds to a subpoena and appears on the witness stand does not mean that she has elected to testify."

{¶51} In this case, the trial court did not determine if Mrs. Pollock elected to testify. The trial court never informed Mrs. Pollock that it was her choice whether or not to testify and the trial court could not force her to do so. While Mrs. Pollock did take the stand, she asked if she could be excused, an indication that she did not elect to testify. Clearly the trial court erred in ordering appellant to answer the question and testify without determining her competency to testify under Evid.R. 601.

{¶52} In addition, the communication between appellant and Mrs. Pollock was not done in the "known presence or hearing of a third person competent to be a witness" under R.C. 2945.42. We find defense counsel erred in failing to invoke spousal privilege.

{¶53} The question is, would the outcome of the trial clearly have been different but for these errors? We answer in the negative.

{¶54} The issue in this case was whether appellant was in possession of stolen property, the vehicle in question. As discussed in Assignment of Error I, Mr. Waller testified appellant pulled into his driveway between 11:30 p.m. and midnight, driving the subject vehicle, and he was alone. T. at 112-113. This evidence supported the fact that appellant was in possession of the stolen vehicle. Despite the testimony that appellant

tried to get his wife to lie about his whereabouts on the evening in question, the outcome of the trial clearly would not have been different given Mr. Waller's testimony.

{¶55} Assignments of Error II and III are denied.

{¶56} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ William B. Hoffman

JUDGES

SGF/sg 0216

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TODD C. POLLOCK	:	
Defendant-Appellant	:	CASE NO. CT2009-0010

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ William B. Hoffman

JUDGES